IN THE HIGH COURT OF SINDH AT KARACHI

Crl. Appeal No. 562 of 2018

Appellant	:	Imran Hayat through Mr. R.K. Kohistani, Advocate.
Respondent	:	The State through Mr. Faheem Hussain Panhwar, Deputy. P.G Sindh.
Date of hearing	:	05th March 2021
Date of decision	:	05th March 2021

JUDGMENT

SALAHUDDIN PANHWAR J.- Appellant/accused has challenged the impugned judgment dated 12.10.2018 passed by learned 1st Additional Sessions Judge, Malir in Sessions Case No.848 of 2017 arising out of FIR No.176/2017, registered under sections 376, PPC at PS Sukhan Karachi whereby the appellant was convicted under Section 265-H(ii) Cr.P.C and sentenced for 25 years. Fine of Rs.50,000/- (Rupees Fifty Thousand Only) was also imposed upon the appellant/accused to be paid to the victim and in case of default thereof he was ordered to suffer R.I. for further six months. Appellant was extended benefit of Section 382-B, Cr.P.C.

2. Succinctly stated, the facts of the prosecution case are that on 24.05.2017 complainant Muhammad Qasim lodged FIR contending therein that ten years ago he had married with one Shabana and out of such wedlock he had three children, namely, Maryam (daughter) aged about 7/8 years, Mahnoor (daughter) aged about 5 years and Ayan (son) aged about 4 years. According to the complainant, about three years ago, his wife Shabana left the house alongwith children and thereafter contracted marriage with Imran (present appellant/accused). He further contended that about one week back his wife brought the children at his home situated at Bagh-e-Korangi for their meeting with him, where his daughter Maryam informed him that her stepfather Imran did filthy acts with her

and even she has been raped by accused Imran many times but being immature and on account of fear she could not disclose such fact to anyone. Consequently, the FIR was registered.

3. After usual investigation, challan was submitted and accused was sent up to face the trial.

4. Charge was framed to which accused did not plead guilty and claimed to be tried.

5. In order to prove its case, prosecution examined PW No.1 Dr. Zakia Khursheed at Ex.03, who is WMLO at Jinnah Hospital and produced police letter dated 24.05.2017 at Ex.3/A and medical examination report at Ex.3/B; PW-2 SIP Sajjad Mehmood at Ex.4, who is author of FIR and produced FIR at Ex.4/A; PW-3 HC Muhammad Akhtar, who being a mushir produced memo of site inspection at Ex.5/A and memo of arrest at Ex5/B; PW-4 Maryam baby at Ex.06, who is the victim of this case and produced her 164 Cr.P.C statement at Exh.06/A; PW-5 Dr. Sheraz Ali at Ex.7, who is Senior MLO at JPMC Karachi and produced ML No.4837 as Ex.7/A and police letter as Ex.7/B; PW-6 SIP Manzoor Ahmed at Ex. 8, who is I.O. and produced departure entry No.80 as Ex. 8/A, arrival entry No.15 at Ex.8/B, letter to Chairman of Forensic Medicine, Toxicology/Molecular as Ex.8/C, chemical report as Ex. 8/D and DNA report as Ex.8/E. Thereafter, prosecution side was closed vide statement at Ex.09.

6. Statement of appellant/accused under section 342, Cr.P.C. was recorded wherein he denied the allegations leveled against him by the prosecution. He neither examined himself on Oath under Section 340(2) Cr.P.C nor adduced any evidence in his defence.

7. Thereafter, learned trial Court after hearing the learned counsel for respective parties, convicted and sentenced appellant as mentioned above. Appellant being aggrieved and dissatisfied with the judgment has filed the instant appeal.

8. Learned counsel for the appellant, *inter alia*, contends that impugned judgment is bad in law and facts inasmuch as the learned trial Court did not appreciate the evidence on record in line with the applicable law and surrounding circumstances and based its findings as a result of misreading and non-reading of evidence as well arrived at a wrong conclusion in convicting the appellants. He next contended that during cross-examination the defence has shattered the evidence of prosecution witnesses but the learned trial Court neither discussed nor evaluated the relevant portions of cross-examinations and convicted the appellant only on the examination-in-chief of prosecution witnesses. He also contended that there are material contradictions in the evidence of the prosecution witnesses and even the medical evidence is contrary to the prosecution; that DNA report of the accused is negative, but the learned Trial Court has not taken the same into consideration and passed the impugned judgment in a slipshod manner. He lastly contended that the prosecution has failed to discharge its liability of proving the guilt of the appellant beyond shadow of reasonable doubt and prayed for setting-aside the impugned judgment and acquittal of the appellant from charge. He has relied upon case law reported as 2013 SCMR 203 and 2013 YLR 2563.

9. In contra learned Deputy Prosecutor General Sindh has contended that prosecution has fully proved the guilt of the appellant up to the hilt through overwhelming evidence which remained unshaken, as such the learned trial Court has rightly held him guilty of the offence. He, therefore, sought dismissal of the appeal.

10. Heard and perused the record.

11. Before proceeding any further, I would not seek an exception to legally established position that a conviction could well be recorded on sole evidence of the victim in such like case(s) because normally the guilty mind would never prefer a place visible to naked eye or where the people could come on a little commotion particularly when the victim, after such offence, is intended to move freely. However, I would be completely safe in saying that before recording conviction on sole evidence of victim, the Court must satisfy itself that such evidence,

beyond any doubt, passes the test of being natural and confidence inspiring one. Any deviation to this, shall result in bringing the base of Criminal Administration of Justice in serious jeopardy which never relieves a Judge from following well settled principles of law i.e.:-

> i) mere seriousness of an offence would never be a ground to detract the Court of law from due course to judge and make the appraisal of evidence, as required by law;
>
> ii) no conviction could be recorded except on direct, natural and ***confidence inspiring evidence***;
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> iii) acceptability of evidence is never dependent upon person or personality;
>
> iv) the benefit of doubt shall always be extended to accused;

12. I would add that crucial test of any evidence is that it must appear to be ***'confidence inspiring'*** which could be none but the one believable to a prudent mind. Needless to add that rape upon a girl of minor age would, *normally,* be noticeable because of intolerable pain and difficulty in walk. The marks of violence / bruising on such a minor girl are also inevitable. I would further add that medical jurisprudence evidences that in adolescent girls the hymen is situated relatively more posteriorly and for said reason there is a possibility of rape being committed without the hymen being torn; the converse whereof would be that if the hymen of an adolescent girl is torn due to rape, the penetration has to be a deep penetration. The narrowness of the vaginal canal makes it inevitable for the male organ to inflict blunt, forceful blows on the labia and such blows lead to contusion is revealed against the pink background of the mucous membrane dark red contusion being evident to the naked eye. In the instant matter the allegation is that of commission of rape by step-father at number of occasions within the house where *undeniably* the real mother of the victim namely **Shabana** was residing in the same house but was never informed of such act nor she (Shabana) herself noticed any such thing. The said Shabana has not been a witness against the appellant / convict though the complainant alleges that victim narrated such allegation when she (Shabana) herself had brought victim and other children for

visitation purpose. The victim allegedly disclosed the facts to the complainant who does not claim to have been in contact with his children for three years period. Such piece of prosecution story appears to be *improbable* because a mother can't be believed to be so careless towards her real daughter unless he had been an accomplice which aspect also appears to be lacking for the reason that she (Shabana), per FIR story, herself had taken the victim to the complainant. None examination of such a natural witness was also reflecting upon prosecution story. I would also add that victim may have a choice to keep herself mum but she was in no position to conceal the effects of rape by appellant / convict (a fully grown person) from her mother and other persons. The DNA report is also negative. These aspects were required to be appreciated by the learned trial Court because the *improper* story legally can't hold the conviction on a capital charge, in particular. The guidance is taken from the case of *Mst. Shamim & 2 others v. The State & another* 2003 SCMR 1466 wherein it is held as:-

> 7. .. The statement of the complainant also makes it manifest that Mst. Shamim was not her friend, she had accompanied Mst. Shamim for the first time and had not enquired about the field from which cotton was to be plucked. The prosecution story is indeed improbable and irrational because it does not appeal to reason that the appellant Nst. Shamim had procured the complainant for her husband and the complainant had accompanied a stranger to pluck cotton from unknown fields. The prosecution story being the foundation on which edifice of the prosecution case is raised occupies a pivotal position in a criminal case. It should, therefore, stand to reason and must be natural, convincing and free from any inherent improbability. **It is neither safe to believe a prosecution story which does not meet these requirements nor a prosecution case based on an improbable prosecution story can sustain conviction.**

13. The only support to such version was provided by prosecution in shape of medical evidence. At this juncture, it would be conducive to refer the examination in chief of PW-1 Dr. Zakia Khursheed (WMLO) as under:

> "**Examination in Chief to Mrs. Shahnaz Anwar DDPP for the State.**
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> I was posted as W/MLO at Civil hospital. When a victim namely Mariyam D/o Qasim Aged about 8 years was brought to me for medical examination on 25.05.2017 at about 5 PM of P.S: Sukhan, Malir under police letter dated:25.05.2017, which I produce at Exh.3/A. She came to me with a history of abduction

and sexual assault. On general examination, **no mark of violence was found over any part of body**. History of sexual assault was **two month back**. The cloths were changed and washed.

P/V Vulva Vagina normal.
Hymen torn old healed.
Vagina admits one finger easily and two finger tightly with tenderness, no tear."

Opinion

In my view, she was not virgo intecta. She has had sexual intercourse, however for any fresh act vigina slide was taken and sent for chemical and DNA analysis. I had delivered the slide to I/O on same day for DNA and Chemical report. I produce medical examination report of victim at Exh.3/B.

14. Perusal of above reflects that there was no mark of violence as well "*Hymen torn old healed*". Further, in cross examination Doctor said that:

"…… It is fact that in rear cases hymen not present, vol says that due to cycling, running, jumping. It is fact that during examination ***no laceration no tear was found****. I have stated that the* ***sexual intercourse was old i.e. two months back as per medical examination and discloser of victim****. It is fact that there is no any medical test which could ascertain that how much hymen is torn old".*

15. The above shows that the medical evidence was not ***sure*** to support the prosecution allegation rather absence of hymen was admitted to be a possible result of cycling running or jumping. No laceration or tear was found which, normally, is inevitable in such like case. Further, the DNA also came in **'negative'** therefore, the version of victim that her stepfather was sexually abusing her in routine was never safe to be accepted for holding the conviction which (conviction) legally can't sustain when there exists a *slightest* reasonable doubt. Accordingly, this is not a case free from doubt, hence, impugned judgment is set aside, appellant shall be released forthwith if not required in any other custody case.

JUDGE

SAJID